

**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee  
Justice Joyce L. Kennard, Chair  
Heather Anderson, Senior Attorney, 415-865-7691

DATE: August 26, 2003

SUBJECT: Appellate Procedure: Create New Petition for Review to Exhaust  
State Remedies (adopt Cal. Rules of Court, rule 33.3 and amend  
rules 28.1 and 44) (Action Required)

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Issue Statement

Defendants in criminal appeals must exhaust their state remedies before seeking federal habeas corpus review. Currently, this can only be done by filing a petition for review in the California Supreme Court that meets all the requirements of rule 28.1 of the California Rules of Court, including the requirement to provide an explanation of how the case presents a ground for review under rule 28(b). However, in some criminal cases in which the defendant intends to seek federal habeas review, there may be no grounds for California Supreme Court review under rule 28(b).

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2004, adopt new rule 33.3 and amend rules 28.1 and 44 of the California Rules of Court to give defendants in criminal appeals, after a decision by the Court of Appeal, the option of filing an abbreviated petition for review in the Supreme Court for the purpose of exhausting state remedies before seeking federal habeas corpus review.

The text of the new and amended rules is attached at pages 6-10.

Rationale for Recommendation

In response to proposals by practitioners representing indigent defendants in criminal appeals, the Supreme Court requested adoption of a procedure that would

give such criminal defendants, after a decision by the Court of Appeal, the option of filing an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before seeking federal habeas corpus review.

The exhaustion doctrine is codified in federal statutes (28 U.S.C. § 2254(b)(1)) and well recognized in the case law (e.g., *O’Sullivan v. Boerckel* (1999) 526 U.S. 838). The doctrine dictates that “when a state prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” (*Id.* at p. 844.) The doctrine is an expression of the longstanding concern of the United States Supreme Court to preserve *comity* between the state and federal court systems. (*Id.* at p. 845.) This proposal for a new petition for review to exhaust state remedies seeks to balance this concern with two other concerns—the concern of the California Supreme Court to focus its limited resources on cases of statewide significance and the concern of practitioners representing indigents to use their limited resources in the manner they deem best for their clients.

Proposed new rule 33.3 would preserve comity by requiring every defendant who intends to take a federal constitutional claim to the federal district court to first present that claim to the Supreme Court by serving and filing a petition for review to exhaust state remedies. Although this proposed new petition would be required to include a statement that “the case presents no grounds for review under rule 28(b),” as the Advisory Committee Comment to proposed rule 33.3 explains, this does not mean the Supreme Court could not order review if it determined the case warranted it. The list of grounds for granting review in rule 28(b) is not exclusive,<sup>1</sup> and the Supreme Court has, on occasion, exercised its discretion to order review in a case that does not present a ground listed in 28(b).

The proposed new rule 33.3 also serves the concerns of the both the Supreme Court and practitioners representing indigents to conserve their limited resources by offering a simpler and less expensive alternative to a normal petition for review. A normal petition for review must comply with each of the procedural requirements of rule 28.1(b), and an original and 13 copies must be filed in the Supreme Court (rule 44(b)(1)). Under this proposal, a petition filed solely to exhaust state remedies will be “abbreviated” in scope and content (proposed rule 33.3(a)), will be prefaced by an acknowledgment that it presents none of the listed grounds for review, and will provide only a “brief” statement of the facts and

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<sup>1</sup> Rule 28(b) provides that the Supreme Court may order review of a Court of Appeal decision: (1) when necessary to secure uniformity of decision or to settle an important question of law; (2) when the Court of Appeal lacked jurisdiction; (3) when the Court of Appeal decision lacked the concurrence of sufficient qualified justices; or (4) for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order.

issues (proposed rule 33.3(b)). Finally, such a petition would not have to be served on the superior court clerk (proposed rule 33.3(c)), and only an original and eight copies will have to be filed (proposed amended rule 44(b)(1)(E)).

The accompanying amendment to rule 28.1(b) would alert practitioners to the fact that a petition for review filed solely to exhaust state remedies before seeking federal habeas corpus relief is governed by the special provisions of rule 33.3 rather than the general provisions of rule 28.1. The amendments to rule 44(b)(1)(C) would provide that, in the interest of economy, parties need only file an original and 10 copies of any petition for a writ within the original jurisdiction of the Supreme Court and of any opposition or other response to such petition. Additional amendments to this rule would delete outdate language and correct cross-references.

#### Alternative Actions Considered

Practitioners originally suggested, as does one of the commentators, that the rules be amended to provide that no petition for review need be filed in the California Supreme Court in order to exhaust state remedies. This alternative approach was considered and rejected by the Supreme Court and the Appellate Advisory Committee because of concern that it might not be consistent with federal law.

#### Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2003 comment process. Six individuals or organizations submitted comments on this proposal. Two commentators agreed with the proposal without suggesting changes, two agreed with the proposal only if modified, and two disagreed with the proposal.<sup>2</sup>

Ms. Elaine A. Alexander, Executive Director of Appellate Defenders, Inc., commenting on behalf of the Directors of the Appellate Projects for the First, Second, Fourth, and Sixth Appellate Districts, expressed concern that the name of the proposed new petition as circulated for comment—Federal Exhaustion Petition for Review—might mislead some litigants to think this is a federal rather than a state pleading. In response to this concern, the Appellate Advisory Committee recommends that the petition be renamed “Petition for Review to Exhaust State Remedies.” This new title accurately reflects the purpose of the proposed new petition and eliminates the potentially confusing language.

Two commentators, Ms. Alexander and Ms. Cheryl Geyerman, Chair of the Appellate Court Committee of the San Diego County Bar Association, raised concerns about whether the requirement in proposed rule 33.3 that the petition

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<sup>2</sup> The full text of the comments that were submitted and the committee responses to these comments is set forth on the accompanying comment chart, beginning on page 11.

state that “the case presents no grounds for review under rule 28(b)” would discourage attorneys from using the proposed new petition. They suggested that attorneys may not consider it appropriate to represent to a court that their client’s case presents no grounds for review, and may therefore conclude that they cannot responsibly utilize the proposed petition. The Appellate Advisory Committee notes that, contrary to these commentators’ suggestions, the rule does not require that the petition represent that there are no grounds for reviewing the case. Rather, it requires a statement that there are no grounds under rule 28(b). As noted above, the grounds for review under rule 28(b) are not exclusive; there may be other, valid grounds on which the California Supreme Court might grant review or on which federal habeas corpus review might be sought. The committee believes that it would not be inappropriate for an attorney to tell the court and his or her client that a petition, while potentially meritorious on other grounds, does not raise any of the grounds for review under rule 28(b). The committee therefore does not recommend any changes to rule 33.3 in response to these comments.

Ms. Elaine Alexander and Ms. Linda Robertson, Supervising Attorney with the California Appellate Project, also suggested that the usefulness of the proposed new petition may be limited by the fact that it cannot be used when a petition contains both issues raised solely for state exhaustion purposes and an issue or issues on which the petitioner is actively seeking review by the California Supreme Court. The committee agrees that defendants often file such “mixed” petitions containing both issues raised only for exhaustion purposes and issues on which review is actively sought. However, the committee believes that changing proposed new rule 33.3 to try to address these “mixed” petitions would make the rule too complex. As is currently done, these “mixed” petitions may continue to be filed using the standard rule 28.1 format.

The State Bar Committee on Appellate Courts raised concerns about whether proposed new rule 33.3 might mislead some petitioners into thinking that using the proposed new petition will necessarily satisfy federal exhaustion requirements. The State Bar committee questioned whether the proposed “abbreviated” petition for review, which includes only a “brief” statement of the facts on which the issues rest and a “brief” statement of the legal issues, would comply with federal exhaustion rules, which require that the federal constitutional issues be fully and fairly presented to the state’s highest court. To address these concerns, the State Bar committee suggested that rule 33.3 be amended to delete the words “abbreviated” and “brief” or to state that the briefs filed in the Court of Appeal are deemed incorporated into the petition. In response to this concern, the Appellate Advisory Committee recommends that the Advisory Committee Comments accompanying rule 33.3 be amended to clarify that compliance with the rule is not a guarantee that the federal courts will find that petitioners have exhausted their state remedies. The committee believes this change will address concerns about

potentially misleading petitioners without eliminating features of the proposed new petition that are intended to address the resource concerns of petitioners and the Supreme Court.

#### Implementation Requirements and Costs

Implementing this proposal is expected to reduce costs for both litigants and the California Supreme Court.

Attachments

Rule 33.3 of the California Rules of Court is adopted and rules 28.1 and 44 are amended, effective January 1, 2004, to read:

**Rule 33.3 Petition for review to exhaust state remedies**

**(a) Purpose**

After decision by the Court of Appeal in a criminal case, a defendant may file an abbreviated petition for review in the Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief.

**(b) Form and contents**

(1) The words “Petition for Review to Exhaust State Remedies” must appear prominently on the cover of the petition.

(2) Except as provided in (3), the petition must comply with rule 28.1.

(3) The petition need not comply with rule 28.1(b)(1)–(2) but must include:

(A) a statement that the case presents no grounds for review under rule 28(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;

(B) a brief statement of the underlying proceedings, including the nature of the conviction and the punishment imposed; and

(C) a brief statement of the factual and legal bases of the claim.

**(c) Service**

The petition must be served on the Court of Appeal clerk but need not be served on the superior court clerk.

**Advisory Committee Comment (2004)**

**Subdivision (b).** Although a petition under this rule must state that “the case presents no grounds for review under rule 28(b)” (rule 33.3(b)(3)(A)), this does not mean the Supreme Court cannot order review if it determines the case warrants it. The list of grounds for granting review in rule 28(b) is not intended to be exclusive, and from time to time the Supreme Court has exercised its discretion

1 to order review in a case that does not present one of the listed grounds. (Compare  
2 U.S. Supreme Court Rule 10 [the listed grounds for granting certiorari, “although  
3 neither controlling nor fully measuring the Court’s discretion, indicate the  
4 character of the reasons the Court considers”].)

5  
6 Rule 33.3(b)(3)(C) requires the petition to include a statement of the factual  
7 and legal bases of the claim. This showing is required by federal law: “for  
8 purposes of exhausting state remedies, a claim for relief [in state court] . . . must  
9 include reference to a specific federal constitutional guarantee, as well as a  
10 statement of the facts that entitle the petitioner to relief.” (*Gray v. Netherland*  
11 (1996) 518 U.S. 152, 162–163, citing *Picard v. Connor* (1971) 404 U.S. 270.)  
12 The federal courts will decide whether a petition filed in compliance with this rule  
13 satisfies federal exhaustion requirements, and practitioners should consult federal  
14 law to determine whether the petition’s statement of the factual and legal bases for  
15 the claim is sufficient for that purpose.

## 16 17 18 **Rule 28.1. Form and contents of petition, answer, and reply**

19  
20 (a) \* \* \*

### 21 22 (b) **Contents of a petition**

- 23  
24 (1) The body of the petition must begin with a concise, nonargumentative  
25 statement of the issues presented for review, framing them in terms of  
26 the facts of the case but without unnecessary detail.  
27  
28 (2) The petition must explain how the case presents a ground for review  
29 under rule 28(b).  
30  
31 (3) If a petition for rehearing could have been filed in the Court of  
32 Appeal, the petition for review must state whether it was filed and, if  
33 so, how the court ruled.  
34  
35 (4) If the petition seeks review of a Court of Appeal opinion, a copy of the  
36 opinion showing its filing date and a copy of any order modifying the  
37 opinion or directing its publication must be bound at the back of the  
38 original petition and each copy filed in the Supreme Court.  
39  
40 (5) The title of the case and designation of the parties on the cover of the  
41 petition must be identical to the title and designation in the Court of  
42 Appeal opinion or order that is the subject of the petition.  
43

(6) Rule 33.3 governs the form and content of a petition for review filed by the defendant in a criminal case for the sole purpose of exhausting state remedies before seeking federal habeas corpus review.

(c)–(f)<sup>3</sup> \* \* \*

#### **Rule 44. Form and filing of papers**

##### **(a) {Form}**

Except as otherwise provided in these rules, all papers filed in a reviewing court may be either produced on a computer or typewritten or proportionally spaced at the option of the party filing them. ~~If typewritten, they shall conform, as far as practicable, to the requirements of subdivision (e) of rule 15. If proportionally spaced, they shall conform, as far as practicable, to the requirements of subdivision (d) of rule 15 and must~~ comply with the relevant provisions of rule 14(b). All copies of papers must be clear and legible. The use of recycled paper ~~shall be~~ is required for all papers filed with the court or served on the parties. The use of recycled paper for the cover of the brief is encouraged.

##### **(b) {Number of copies}**

If a brief, paper, or document, other than the record, is filed in a reviewing court the following number of copies ~~shall~~ must be filed:

(1) If filed in the Supreme Court:

~~(i)(A)~~ (A) ~~a~~An original and 13 copies of a petition for review ~~or other petition, or an answer, opposition, or other response to a petition or a reply;:-~~

~~(ii)(B)~~ (B) ~~a~~An original and ~~14~~ 13 copies of a brief in a cause pending in that court;:-

(C) ~~a~~An original and 10 copies of a petition for a writ within the court's original jurisdiction or an opposition or other response to the petition;:-

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<sup>3</sup> Please note that, as part of a separate proposal, the Appellate Advisory Committee is proposing that current subdivision (d) of rule 28.1 be deleted.



~~(iii)~~(D) aAn original and 8 copies of a notice of motion, motion, or opposition or other response to a motion-; and

(E) aAn original and 8 copies of a federal exhaustion petition for review, an answer, or a reply-; and

~~(iv)~~(F) aAn original and one copy of any other document or paper.

(2) If filed in a Court of Appeal:

~~(i)~~(A) aAn original and 4 copies of a petition or an answer, opposition, or other response to a petition-; and

~~(ii)~~(B) aAn original and 4 copies of a brief and, in civil appeals, proof of delivery of 5 copies to the Supreme Court-; and

~~(iii)~~(C) aAn original and 3 copies of a notice of motion, motion, or opposition or other response to a motion-; and

~~(iv)~~(D) aAn original and one copy of any other document or paper.

(c) {Covers}

So far as practicable, the covers of briefs and petitions should be in the following colors:

Appellant's opening brief (rule 16 <u>13</u> (a)).....	green
Respondent's brief (rule <del>16</del> <u>13</u> (a)).....	yellow
Appellant's reply brief (rule <del>16</del> <u>13</u> (a)).....	tan
Amicus curiae brief.....	gray
Petition for rehearing.....	orange
Answers to petition for rehearing.....	blue
Petition for original writ or answer (opposition) to writ petition.....	red
Petition for review (rule 28 <del>(b)</del> <u>(a)</u> ).....	white
Answer to petition for review (rule 28 <del>(c)</del> <u>(a)</u> ).....	blue
Reply to answer (rule 28 <del>(d)</del> <u>(a)</u> ).....	white
Petitioner's brief on the merits (rule <del>29.3</del> <u>(29.1)</u> (a)).....	white
Answer brief on the merits (rule <del>29.3</del> <u>(29.1)</u> (a)).....	blue
Reply brief on the merits ( <u>rule 29.1(a)</u> ).....	white

1 A brief or petition not conforming to this subdivision ~~shall~~ must be  
2 accepted for filing; but in the case of repeated violations by an attorney or  
3 party, the court may proceed as provided in rule ~~18~~ 14(e).  
4

5 **(d) {Attorneys' names, addresses, telephone numbers, State Bar numbers}**  
6

7 Every brief and other paper filed in a reviewing court ~~shall~~ must contain on  
8 the cover, or on the first page if there is no cover, the name, address, and  
9 telephone number of the attorney filing the paper, and the California State  
10 Bar membership number of that attorney and of every attorney who joins in  
11 the brief or paper. California State Bar membership numbers of the  
12 supervisors in a law firm or public law office of the attorney responsible for  
13 the case need not be stated.  
14

15 ~~Until July 1, 1994, a brief or other paper shall not be rejected for filing~~  
16 ~~because the attorney's California State Bar membership number is missing,~~  
17 ~~but it may be stricken if the attorney does not furnish the number promptly~~  
18 ~~upon request by the clerk.~~  
19

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Appellate Procedure—Federal Exhaustion Petition for Review  
(adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
1.	Ms. Elaine A. Alexander Executive Director Appellate Defenders, Inc., on behalf of the Directors of the Appellate Projects for the First, Second, Fourth, and Sixth Appellate Districts	N	Y	<p>Regarding proposed new rule 33.3 of the California Rules of Court governing petitions for review filed to exhaust state remedies:</p> <p>1. We are concerned the terminology “Federal Exhaustion Petition for Review” may mislead some readers into thinking this is a federal pleading rather than state pleading.</p> <p>We suggest that such a petition be designated “Petition for Review (Pursuant to Rule 33.3(b)).” This change would affect the headings to rule 33.3 and 33.3(b), the text of rule 33.3(b)(2), the second paragraph of the Advisory Committee Comment to rule 33.3, and the text of rule 44(b)(1)(E).</p> <p>2. Many lawyers may not consider it appropriate to represent to a court that a case presents <u>no</u> grounds for review, and may conclude that they responsibly cannot utilize the proposed rule. The terminology could also create difficulties with some clients. This will greatly limit the intended benefit of this proposed rule. Any potentially meritorious claim for relieve arguably presents some ground for review, even if it is unlikely that the court will grant review. The designation of the petition on the cover as one pursuant to rule 33.3 could be sufficient identification to permit the Supreme Court to process the case as a federal exhaustion one.</p>	<p>The Appellate Advisory Committee has renamed the petition as a “Petition for Review to Exhaust State Remedies.” This new title accurately reflects the purpose of the proposed new petition and eliminates the potentially confusing language.</p> <p>The committee notes that, contrary to this commentator’s suggestion, the rule does not require that the petition represent that there are <u>no</u> grounds for reviewing the case; it requires a statement that there are no grounds <u>under rule 28(b)</u>. The grounds for review under rule 28(b) are not exclusive; there may be other, valid grounds on which the California Supreme Court might grant review or on which federal habeas review might be sought. The committee believes that it would not be inappropriate for an attorney to tell the court and his or her client that a petition, while potentially</p>

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**Appellate Procedure—Federal Exhaustion Petition for Review  
(adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>We suggest the proposed rule be modified to delete the words “the case presents no grounds for review under rule 28(b) and” from subdivision (b)(3)(A) and the second paragraph of the Advisory Committee Comment to that rule be changed accordingly. We also recommend the word “sole” be deleted from proposed rule 33.3(b)(1), the second paragraph of the Advisory Committee Comment to that rule, and the proposed amendment to rule 28.1(b)(6); the word “solely” should likewise be deleted from proposed rule 33.3(b)(3)(A).</p> <p>3. Often a petition will raise one issue on which review is seriously sought, and one or more other issues, which are included primarily for exhaustion purposes. So that those petitions can be prepared and processes most expeditiously, we suggest adding the following provision:</p> <p>Rule 33.3(c)(Issues) Where some, but not all, of the issues in a petition for review, are included primarily for federal exhaustion purposes, the petition must be designated, “Petition for Review” and comply with rule 28.1(b)(1)-(2). Those issues that are included primarily for exhaustion purposes may be presented in the abbreviated format set forth in rule 33.3(b) if they are specifically designated “Issue Pursuant to Rule 33.3” in the topical index and in the heading to the argument of the issue, along with the summary of the argument required by rule 14(a)(1)(B).</p>	<p>meritorious on other grounds, does not raise any of the grounds for review under rule 28(b). The committee therefore does not recommend any changes to rule 33.3 in response to these comments.</p> <p>The committee agrees that defendants often file such “mixed” petitions which contain both issues raised only for exhaustion purposes and issues on which review is actively sought. However, the committee believes that changing proposed new rule 33.3 to try to address these “mixed” petitions would make the rule too complex. As is currently done, these “mixed” petitions can continue to be filed using the standard rule 28.1 format.</p>

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**Appellate Procedure—Federal Exhaustion Petition for Review  
(adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
2.	Ms. Gloria Barnes Legal Process Clerk Superior Court California, County of Santa Cruz	A	N	No comment.	No response needed.
3.	State Bar Committee on Appellate Courts	N	N	<p>The Committee agrees that it is useful to acknowledge that in many instances, petitions for review in criminal appeals are filed solely for the purpose of exhausting state remedies and to provide a procedure for exhausting state remedies which does not require the petitioner to attempt to argue that the issues presented meet the criteria of rule 28(b), since, in many such cases, the issues simply do not meet those criteria. However, the Committee is concerned that by providing for an “abbreviated” petition for review which is mandated to include only a “brief” statement of the facts on which the issues rest and a “brief” statement of the legal issues, proposed rule 33.3 might not be sufficient to comply with federal exhaustion rules, which require that the federal constitutional issues be fully and fairly presented to the state’s highest court, and which prohibit reliance on any facts not present to that court.</p> <p>The Committee believes that it is not appropriate to adopt a rule which might lead practitioners (or defendants acting in propria person) to assume that compliance with the state rule will necessarily ensure compliance with federal exhaustion requirements, when in fact it remains undetermined whether an “abbreviated” petition with merely a “brief” statement</p>	In response to this concern, the committee has revised the Advisory Committee Comments accompanying rule 33.3 to clarify that compliance with the rule is not a guarantee that the federal courts will find that petitioners have exhausted their state remedies. The committee believes that this change will address concerns about potentially misleading petitioners without eliminating features of the proposed new petition that are intended to address the resource concerns of petitioners and the Supreme Court.

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Appellate Procedure—Federal Exhaustion Petition for Review  
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	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>of the legal and factual bases of the claim will suffice under existing federal law. The Committee does not believe that the reference to <i>Gray v. Netherland</i> (1996) 518 U.S. 152, 162-163 in the third paragraph of the proposed Advisory Committee Comment is sufficient to put practitioners on notice of the scope of the federal exhaustion requirements, particularly when it is coupled with the sentence following that reference, which reiterates that the rule 33.3 petition should be “as ‘abbreviated’ as the case permits.”</p> <p>For those reasons, the Committee recommends that the proposed rule be amended to delete the word “abbreviated” from subdivision (b)(1) and to delete the word “brief” from subdivisions (b)(3)(B) and (C), so the subdivision would read as follows:</p> <p>“(b) Federal exhaustion petition for review (1) After decision by the Court of Appeal in a criminal case, a defendant may file <del>an</del> <del>abbreviated</del> petition for review in the Supreme Court for the sole purpose of exhausting state remedies before presenting a claim for federal habeas corpus relief.</p> <p>(2) The words “Federal Exhaustion Petition for Review” must appear prominently on the cover of the petition. The petition need not comply with rule 28.1(b)(1)-(2) but must include:</p>	

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Appellate Procedure—Federal Exhaustion Petition for Review  
(adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44)

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				<p>(A) a statement that the case presents no grounds for review under rule 28(b) and the petition is filed solely to exhaust state remedies for federal habeas corpus purposes;</p> <p>(B) a <del>brief</del> statement of the underlying proceedings, including the nature of the conviction and the punishment imposed; and</p> <p>(C) a <del>brief</del> statement of the factual and legal bases of the claim.</p> <p>(3) The petition must be served on the Court of Appeal clerk but need not be served on the superior court clerk.”</p> <p>The Advisory Committee Comments should also be amended accordingly, and should expressly state that it is the duty of the practitioner to determine how extensive a statement of the facts and issues is necessary to comply with federal exhaustion requirements.</p> <p>In the alternative, the Committee suggests that the rule be amended to include a provision that the briefs filed in the Court of Appeal are deemed incorporated in the rule 33.3 petition. (This would probably require an amendment to 28.1(f)(2), to state this exception to the “no incorporation by reference” rule.) This will give some assurance that the federal constitutional issues,</p>	

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**Appellate Procedure—Federal Exhaustion Petition for Review  
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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>as developed in the Court of Appeal, are fully before the California Supreme Court. The Committee expresses no opinion as to whether the federal courts will deem that procedure sufficient for exhaustion purposes, but feels that incorporating the briefs into the rule 33.3 petition at least provides a greater likelihood that the federal courts will deem the issues fully presented to the California Supreme Court than a mere “brief” statement of the legal and factual bases of the claim.</p> <p>(4) The Committee recognizes the laudable goal of minimizing the cost of petitions for review, which are filed solely for purposes of exhaustion. However, the Committee believes that practitioners will spend at least as much time preparing a condensed statement of the legal and factual issues as they currently do when incorporating their arguments into the petition for review and drafting an argument as to why review should be granted despite the absence of issues that meet the criteria of rule 28(b). There is little to be gained in terms of reducing that of copies of the petition to be filed and served.</p>	The committee continues to believe that this proposal will result in saving petitioners time and money. At the very least, petitioners will no longer be required to try to give reasons why a petition satisfies the criteria of rule 28(b) when they do not believe that there are grounds for review under rule 28(b).
4.	Mr. Robert Gerard President Orange County Bar Association	A	N	No comment.	No response needed.
5.	Ms. Cheryl A. Geyerman Appellate Court Committee	AM	N	Proposed rule 33.3, with corresponding amendments to rules 28.1 and 44, established an abbreviated form	No response needed.



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**Appellate Procedure—Federal Exhaustion Petition for Review  
(adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
	San Diego County Bar Assn..			<p>for petitions for review intended primarily to exhaust state remedies as a prerequisite to federal habeas corpus. We strongly support the proposal and foresee large savings, both in expenses and time.</p> <p>We are concerned that some attorneys may balk at saying explicitly the case “presents no grounds for review under rule 28(b)” and the petition is filed “solely” to exhaust state remedies. It may strike them as arguing against the client and affirmatively disavowing any interest in having review granted. The alternative language “This petition is submitted pursuant to rule 33.3 of the California Rules of Court and is filed to exhaust state remedies” will effectively signal to the Supreme Court the nature and purpose of the petition, without creating the appearance the attorney is deprecating its merit. The cover, likewise, could be labeled “Petition for Review Pursuant to Rule 33.3.”</p>	<p>The committee notes that the grounds for review under rule 28(b) are not exclusive, there may be other, valid grounds on which the California Supreme Court might grant review or on which federal habeas review might be sought. The committee believes that it would therefore not be inappropriate for an attorney to tell the court and his or her client that a petition, while potentially meritorious on other grounds, does not raise any of the grounds for review under rule 28(b). The committee is therefore not suggesting any changes to rule 33.3 in response to these comments. The committee has, however, renamed the petition as a “Petition for Review to Exhaust State Remedies.”</p>
6.	Ms. Linda Robertson Supervising Attorney California Appellate Project	AM	N	<p>The truncated petition for review proposed in this rule is limited in its usefulness by the fact that it cannot be used when a petition contains any issue on which the petitioner is actively seeking review by the California Supreme Court. We would propose adding language allowing use of the abbreviated form for some, but not all, claims, perhaps as follows: “When some, but not</p>	<p>The committee agrees that defendants often file such “mixed” petitions which contain both issues raised only for exhaustion purposes and issues on which review is actively sought. However, the committee believes that changing proposed new rule 33.3 to try to address these “mixed”</p>

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(adopt Cal. Rules of Court, rule 33.3, and amend rules 28.1 and 44)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>all, claims in a petition for review are included primarily for exhaustion purposes, the petition must be designated ‘Petition for Review,’ and is subject to the rules governing the form and filing of such petition generally. However, those claims that are included primarily for exhaustion purposes may be presented in the abbreviated format set forth in Rule 33.3(b)(3).”</p> <p>We note that the Judicial Council could solve the problem, which this rule seeks to address by abolishing the requirement that a petition for review be filed to exhaust federal constitutional claims, and we respectfully suggest that it consider doing so. It is not necessary for states to require a petition for review to their highest courts for exhausting purpose. O’Sullivan v. Boerckel, 526 U.S. 838 (1999). Eliminating that requirement in California would save substantial and effort for counsel and courts.</p>	<p>petitions would make the rule too complex. As is currently done, these “mixed” petitions can continue to be filed using the standard rule 28.1 format.</p> <p>This alternative approach was considered and rejected by the Supreme Court and the Appellate Advisory Committee at the time the new petition was first proposed because of concern that it might not be consistent with federal law</p>